IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

APPEAL FROM ORDER NO.897 OF 2004
IN
SPECIAL C.S. NO.15 OF 2003

M/s.Anmol Developers ... Appellant

V/s.

Shri Kamlakar D. Chimane & Ors. ... Respondents

Mr.A.C. Singh with D.R. Shah for Appellant
Mr.N.V. Walawalkar with S.A. Sawant & H.V. Kode for Respondent Nos.1 to 4
Mr.G.S. Hegde for Respondent Nos.5 and 6
Mr.G.S. Godbole for Respondent No.7

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **NOVEMBER 5, 2004**

P.C.:

. This Appeal is directed against the dismissal of the Exhibit 5 application made by the appellants in the Suit filed by them before the Civil Judge, Senior Division, Panvel. The temporary injunction sought under Order 39 Rule 1 and 2 of the Code of Civil Procedure was refused.

2. One Dattu Goma Chimane was the owner of certain lands which were acquired by CIDCO, i.e., Respondent Nos.5 and 6 herein. These lands were then allotted to various other persons. Respondent Nos.1 to 4 who are

the heirs of Dattu Goma Chimane, were allotted a plot of land of 1850 sq.mtrs. in Village Kamothe, Sector No.10 by CIDCO under a letter of allotment dated 23.5.2002. According to the appellant, since Respondent Nos.1 to 4 required money to pay CIDCO to avail of the letter of allotment and to take possession of the land it entered into a Memorandum of Understanding (MoU) which in fact was an agreement of sale with Respondent Nos.1 to 4. The Appellant claims to have parted with large sums of money so that Respondent Nos. 1 to 4 could secure possession of the leasehold plot of 1850 sq.mtrs. This MoU was arrived at between the parties on 21.12.2000, even prior to the letter of allotment.

3. After being paid the amount under the MoU Respondent Nos.1 to 4 and two other heirs of Dattu G. Chimane entered into a development agreement with Respondent No.7 for developing the leasehold plot of land. This agreement was entered into on 22.11.2002, two years after the MoU. The appellant then filed a suit on 31.1.2003 for specific performance of the contract dated 21.12.2000. An application for temporary injunction was also preferred. Although by ad-interim orders the status quo was directed to be maintained, the trial Court on 4.10.2004 has rejected the application. The trial Court essentially has rejected the application on two counts, namely, the MoU could not be considered

to be an agreement of sale and, therefore, prima facie, there could be no specific performance of such agreement. It was also observed by the trial Court that since there was no permission granted to Respondent Nos.1 to 4 to sell the land leased to them, there could not be an agreement of sale.

4. Mr.A.C. Singh, appearing for the appellant, submits that the MoU is clearly an agreement of sale and that the parties could in case of breach of the agreement seek specific performance of the agreement. He submits that this clause is an indication of the MoU being an agreement of sale and, therefore, no permission was necessary from CIDCO since the sale was not complete. According to the learned Advocate, the appellant had paid huge sums of money to Respondent Nos.1 to 4, who were now resiling from the MoU of 21.12.2000. He submits that the appellant is entitled to a temporary injunction pending the suit since they have made out a prima facie case and the balance of convenience is in their favour. He further submits that the appellant cannot be prejudiced in the manner that it has, by parting with huge amounts to Respondent Nos.1 to 4 and then be denied the completion of the contract of sale.

5. In support of his submission, he relies on the

judgment of this Court in the case of *Volition Investments Pvt.Ltd. v/s. Madhuri Jitendra Mashroo,* 2003 (2) ALL MR 900 and *Nalin Virjee Shah v/s. Narayan R. Mhatre & Ors., 2002 Vol. 104 (3) Bom.L.R. 473*. In the first judgment, this Court has held that the agreement entered into between the parties qualified as an agreement for sale of immovable property and that a deficiency of the agreement not being stamped sufficiently could be fulfilled after payment of penalty at the time the trial proceedings. It was, therefore, the case of the learned Counsel that the defect in the MoU being insufficiently stamped could always be cured by putting the appellant to terms. He urges that the MoU constituted an agreement of sale whereby the vendors had agreed to sell their land of 1800 sq.mtrs. to the appellant for a consideration, a part of which had already been received by the vendors. The second judgment which the learned Counsel relied on in the case of Nalin V. Shah .., a learned Single Judge of this Court was considering a case where two sets of developers staked their claim in respect of certain properties. One of the developers-the appellant in that case claimed under agreement of sale cum development whereas the respondent in that case claimed under the development agreement. The plot in that case was also allotted by CIDCO to the lessees who then entered into two sets of agreements. The learned Judge was of the

view that the relationship with CIDCO could not be given overbearing importance as both agreements were entered into by the parties with the allottees; the agreement with one of the developers was construed as an agreement of sale. In such circumstances, the learned single Judge of this Court held that in case there was an agreement of sale of which specific performance could be claimed. The learned Single Judge was of the view that in such circumstances, a temporary injunction could be granted in favour of the appellant in that case who was claiming under an agreement of sale cum development of the property as he had a better claim than the respondents who claimed under a development agreement.

6. Mr.Walawalkar, learned Counsel appearing on behalf of the lessees, that is Respondent Nos.1 to 4, submits that the MoU is an inchoate document as unless there is an agreement of sale there could be no specific performance of a contract in respect of which there is only a MoU. In the alternative, he submits that if the document is to be considered as an agreement of sale, it is understamped as the document is on a stamp paper, the value of which is far less than required for an agreement of sale. A document for agreement of sale must be on a stamp paper worth 1% of the agreed consideration, which admittedly is not so in the present case. He, therefore, submits that the document has no

value and in any case cannot be specifically enforced. Moreover, according to the learned Advocate, although the MoU was entered into between the parties in the year 2000, the amount was paid under the MoU only in the year 2001. He then submits that the judgment of the Supreme Court in the case of *Agricultural Produce Market Committee, Gondal & Ors. v/s. Girdharbhai Ramjibhai Chhaniyara & Ors., (1997) SCC 468* indicates the instances and the circumstances in which a party can seek a temporary injunction. He further relies on the judgment of the Apex Court in the case of *State of Orissa v/s. Madan Gopal Rungta, AIR (39) 1952 SC 12* where the Apex Court has considered when interim relief should be granted.

7. Mr.Godbole, appearing on behalf of Respondent No.7 in essence supports the submissions made by Mr.Walawalkar and urges that the appeal itself is not maintainable. He points out that there are six heirs of Dattu G. Chimane; however, the MoU is signed by only four of the legal heirs of the original lesse. The appeal has also been filed against only four of those persons. He submits that the agreement which Respondent No.7 has entered into with the legal heirs of the original lessee has been signed not only by Respondent Nos.1 to 4 but also the other two heirs of Dattu Chimane, namely, Lalita Bhalchandra Chimane and Pushpa

K. Chimane. This is an agreement for development under which Respondent No.7 has already paid about Rs.9 lacs to the parties for which there is a receipt appended to the development agreement. He submits that the MoU does not take care of the rights of two of these heirs. Furthermore, according to him, under section 6 of the Transfer of Property Act, only certain kinds of property can be transferred and a lessee or a tenant cannot transfer such property. The learned Advocate submits that the agreement entered into between Respondent No.7 and the heirs of Dattu Chimane is a development agreement for which no consent is required from CIDCO. It is only if the rights in the plot of land were to be transferred to Respondent No.7 that it would be necessary to obtain a No Objection Certificate from CIDCO.

8. Mr.Hegde, learned Counsel appearing for Respondent Nos.5 and 6, submits that CIDCO has not authorised the sale of any land to the appellant. Therefore, a document, purportedly an agreement of sale cannot bind CIDCO.

9. Having heard the learned Counsel for the parties, I am of the view that the learned trial Judge has rightly dismissed the Exhibit 5 application. The MoU which is sought to be relied on and of which

specific performance is sought is a document which prima facie does not appear to be an agreement of sale.

10. Clauses 4 and 5 of the MoU reads thus:

> 4. The parties of the First Part have agreed to sell, transfer and assign all their right, title and interest of land admeasuring about 1000 Sq.Mtrs. which the parties of the second part shall be the exclusive owner of the land and shall be entitled to develop and sell the Flats, Shops, Garages, etc.
>
> 5. The Parties of the second part agreed that the remaining land admeasuring about 850 sq.mtrs. shall be developed and built flats, shops out of which 75% construction area shall remained excluding with the parties of the second Part and shall be entitled to sell and dispose off.

Clause 13 reads thus:

> 13. The Party of the first part have agreed that they will execute all necessary documents, such as agreement for sale, conveyance, deed of confirmation, general power of Attorney, Affidavit, Declaration, and shall Co-operate to register the said documents and shall not demand any additional amount in any manner whatsoever. (Emphasis supplied)

11. There is no doubt after considering these clauses that the parties had only agreed to execute an agreement for sale, conveyance, deed of confirmation, etc. The MoU leaves no room for any dispute, prima facie, that it cannot be enforced under the Specific Relief Act. In such circumstances, therefore, the trial Court was right in not granting any interim injunction.

12. The advocates for the respondents have sought to

defend the orders of the trial Court on grounds besides those which the trial Court has thought it fit to reject the application for temporary injunction. Mr.Singh vehemently opposes this. However, this opposition cannot be countenanced as it is trite law that a party can always support the judgment of a lower Court on grounds other than made out in the order of the trial Court.

13. The prayers in the plaint indicate that the appellant has sought for specific performance of the MoU.

> "16.a) It be declared and decreed that Agreement dated 21.12.2000 in respect of suitproperty is valid, subsisting and binding upon all the Defendants.
>
> b) The Defendant no.1 to 4 be decreed and order to effect the specific performance of the contract by selling, transferring and alienating their rights, title or interest in respect of the suit property in favour of the Plaintiffs.
>
> c) It be ordered and decreed to Defendant No.1 to 4 to execute and Irrevocable Power of Attorney and carry out all his obligations by delivering the possession of the suit property to Plaintiff.
>
> d) It be declared and decreed that the Agreement/s or development agreement/s or document/s etc. if it is executed or produced by the Defendants are null and void and not binding on the Plaintiff.
>
> e) This Hon’ble Court may be pleased to pass the permanent and temporary injunction order against the Defendant No.1 to 4 and

7 (including its agent, servant, officers, contractor, etc.) restraining them from carrying out construction over the suit property.

f) Hon'ble Court may be pleased to pass the permanent and temporary injunction against the Defendant Nos.5 and 6 restraining them from executing the Lease Agreement/extension of licence etc. if any in future or restraining them from granting the development permission or occupancy certificate if any in respect of suit property.

g) Hon'ble court may be pleased to declared, decreed and ordered to Defendants to hanover the possession of the suit property to Plaintiff and thereafter be order to execute the lease agreement with the Plaintiff by Defendant No.5.

h) Cost of the proceedings may be awarded.

i) Any other further order may be passed in favour of Plaintiff."

14. Obviously, therefore, the suit as it stands only seeks a declaration that the agreement dated 21.12.2000 in respect of the suit property is valid, subsisting and binding upon all the defendants. The defendants to the suit are only four of the heirs of the Dattu G. Chimane. The other two heirs are not parties to the suit. When the agreement itself which is sought to be relied on is not an agreement of sale, firstly because the clauses in the agreement indicate that an agreement of sale was to be entered into between the parties and secondly because the agreement if construed as an agreement of sale is understamped, there can be no specific performance of such an agreement. Therefore,

in my view, the trial Court has appreciated the matter correctly and has refused to grant the temporary injunction in favour of the appellant.

15. Reliance placed on the judgment in the case Volition Investments (supra) by Mr.Singh is misplaced. In that case, the learned Single Judge of this Court considered the documents and held that the transaction between the parties was in fact an agreement of sale and not a MoU simpliciter. The learned Judge has observed thus:

> 11. In ordinary and common parlance as understood a transaction for sale is an exchange of a commodity or service for cash or kind. The vendor or the seller barters away his property, movable or immovable, for valuable consideration in cash or in kind paid or payable by the buyer. Under the MoU under question, the plaintiffs have paid to the defendant a price in part of the total price agreed between the parties. The total price agreed was Rs.1 Crore for the property. In return the plaintiffs were promised by the defendant - owner the rights and interest in the property to be developed by them and to be sold by them in the open market the additionally constructed flats on permissible F.S.I. and to earn or retain the whole amount with them. They were also given all the rights of the landlord qua the tenants/occupants of the suit premises. They were virtually put in the place of the owner-defendant of the building while dealing with the tenants in every respect as provided in the MOU, including the right to collect rent from the tenants - occupants. The plaintiffs have virtually stepped in the shoes of the landlord of the building i.e., the defendant, under the MOU. Such a role cannot be assigned to a developer- simplicitor of the structure. He will merely develop the building as per agreement and will get out after getting his price for the work. He will render his

> services and get his agreed amount and nothing more in the bargain. The tenants and their rights and liabilities will not be his problems. He will not be required to pay any amount to the owner of the building or to provide any permanent accommodation to the owner and the tenants in addition to the work of the development to be done by him for the owner. In the present case, the plaintiffs have to pay a sum of Rs.1 Crores in addition to provision of permanent alternative accommodation for the defendant and her tenants and also do the work of development of the structure to earn out of the sale of the additionally developed area. It is, therefore, quite clear that the plaintiffs are to pay to the defendant a sum of Rs.1 Crore as consideration in cash and also to provide for her and her tenants permanent accommodation in return of the suit property with all the appertaining rights and interest as also the obligations of the ownership of the property. ..

16. The learned Judge has held that in the case before him the intention to transfer the immovable property could be seen from the document at hand and it was for that reason it was construed as an agreement of sale. It was only because the document in question was considered as agreement of sale of immovable property that interim injunction was granted in favour of the purchaser.

17. In my view, the MoU in the instant case does not in any manner indicate that the parties had agreed to transfer the ownership rights to the appellant. Clauses 4 and 5 indicate that the MoU is merely an understanding which was reached between the parties to develop and share the profits of part of the land. Thehe parties agreed to execute all necessary documents including an

agreement of sale and conveyance. This would prima facie indicate that the MoU cannot constitute an agreement of sale but only shows the intention of the party to arrive at an agreement with the other side for developing the property.

18. In any event, there cannot be sale of the plot of land as it is CIDCO which has leased out the plot to the heirs of Dattu G. Chimane who are Respondent Nos.1 to 4. Obviously, therefore, if CIDCO is the owner of these plots of land, no sale can be effected without the consent of CIDCO. Assuming the trial Court was to decree the suit, no direction has been sought against CIDCO for transferring the plot of land to the appellant and therefore, no such transfer can take place unless CIDCO agrees to the same.

19. In the case before the Supreme Court in Agricultural Produce Market Committee (supra), the Apex Court held that a temporary injunction cannot be sought when the respondents in that case did not have any concluded right to seek enforcement against the Market Committee. At best the respondents in that case had a right to apply and seek for allotment of the shop. The Apex Court has held that since the respondents did not have any concluded right, they were not entitled to a temporary injunction. According to the Apex Court, the

rights of the respondents in that case were still "in embryo" and enforcement of such a right was unthinkable even under Order 39 Rule 2 of C.P.C. Furthermore, in the case of State of Orissa (supra), the Apex Court while considering the principles governing the grant of interim relief in a writ petition has observed thus:

> 6. ... An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of the opinion that there was no other convenient or adequate remedy open to the Petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution such suit, issue directions in the nature of temporary injunctions, under Art.226 of the Constitution. In our opinion, the language of Art.226 does not permit such an action. On that short ground, that judgment of the Orissa High Court under appeal cannot be upheld.

20. The judgment relied on by Mr.Singh in the case of Nalin V. Shah (supra) also has no application to the facts and circumstances of the present case. Although the learned Advocate has sought to establish that the facts in the present case and those before the Court in Nalin V. Shah (supra) are similar it is not possible to

accept this submission. In that case, two agreements were entered into. The first on 2.7.2000 and the second on 11.10.2000. Specific performance was sought of the agreement of 11.10.2000. The first agreement was entered into between the proposed purchaser and the vendors the second agreement was entered into after CIDCO had issued on 4.10.2000 a letter of allotment. In the present case, the MoU which is sought to be relied on and specifically enforced has been executed by the parties even prior to the letter of allotment. The letter of allotment admittedly is of 23.5.2002 whereas the MoU has been executed in December, 2000. The MoU has no description of the suit property and, therefore, cannot constitute an agreement of sale. As rightly pointed out by the advocates for the respondents in the case of Nalin V. Shah (supra), the learned Judge considered specific performance of the second agreement that is the agreement entered into between the parties after the allotment letter was issued by CIDCO. It is in these circumstances that the learned Judge observed that the document executed was an agreement which can be specifically enforced. Furthermore, in that case, CIDCO had filed purshis stating that they would be able to transfer the plot further in the event certain requirements are complied with. In the present case, the learned Advocate for CIDCO specifically stated that Respondent Nos.5 and 6 have not agreed to any sale or

transfer of the allotment made in favour of Dattu Goma Chimane. The judgment of the learned Single Judge will therefore, have no application to the facts in the present case.

21. In the circumstances, Appeal from Order is dismissed.

22. However, admittedly Respondent Nos.1 to 4 have been paid certain amounts by the appellants. These amounts shall be deposited by the respondents within three weeks from today in the trial Court without prejudice to the rights and contentions of the parties.

23. Mr.Singh, the learned advocate for the Appellant prays that the status-quo as of today be continued for a period of 4 weeks. Accordingly, there be an order of status-quo as of today for a period of 4 weeks.

24. Certified copy expedited.